Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

NO. 78-709

MELVIN C. WETTERLIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner Melvin C. Wetterlin prays that a writ of certiorari issue to review that portion of the judgment and opinion of the United States Court of Appeals entered in this case on August 24, 1978, affirming petitioner's conviction of violating Title 18, United States Code, Section 1623.

OPINION BELOW

The judgment of the United States District Court for the Northern District

of Indiana was entered without opinion. The opinion of the United States Court of Appeals for the Seventh Circuit, not yet reported, is set forth in the Appendix hereto. (A1 through A15)

JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1978 (Appendix, p. A16). A timely petition for rehearing was denied on September 27, 1978 (Appendix, p. A18). The jurisdiction of this Court is invoked under Title 28. United States Code, Section 1254 (1) and Rule 22 (2).

QUESTIONS PRESENTED

Whether a district court may accept a plea of guilty and enter a judgment thereon,

a. when the court fails personally to address the defendant in open court and inform him of, and determine that he understood, the nature of the charge to which the plea was offered; and

b. when the record fails to show a factual basis for the plea, and the only conduct which the defendant admits does not constitute the offense charged to

which the plea is entered;

c. without having a plea agreement disclosed on the record and without indicating thereon, whether such was accepted or rejected; and

d. when the defendant continuously denies guilt.

STATUTE AND RULE INVOLVED

Title 18, United States Code, Section 1623, is set forth in the Appendix (A24).

Rule 11, Federal Rules of Criminal Procedure, is set forth in the Appendix (A27).

STATEMENT OF THE CASE

This was a direct appeal to the United States Court of Appeals for the Seventh Circuit from a judgment of conviction and the imposition of sentence by the United States District Court for the Northern District of Indiana, on the petitioners plea of guilty to two counts of an indictment. The indictment, returned on September 30, 1976, charged the petitioner in Count I with conspiring with others to violate the mail fraud statute (18 U.S.C. 1341) and the travel

act (18 U.S.C. 1952) and in Count X with knowingly making material false declarations while under oath before the grand jury (18 U.S.C. 1623). The indictment also charged the petitioner, and others, with substantive counts under the mail fraud statute and the travel act.

Petitioner was arraigned on October 7, 1976, and pleaded not guilty to each of the Counts. On January 31, 1977, petitioner, who was represented by counsel, changed his plea from not guilty to guilty as to Counts I and X. Subsequently petitioner obtained new counsel who challenged the procedures employed by the Court at the January plea hearing, alleging that they failed to comply with the requirements for accepting a guilty plea mandated by Rule 11 of the Federal Rules of Criminal Procedure, and asserted that petitioner was denying his guilt. At the disposition hearing on May 24, 1977, the Court indicated that "serious questions" had been raised by petitioner and that it was not prepared to go forward with the sentencing. At the June 29, 1977 disposition hearing the district judge indicated that he felt he "had been had" and despite petitioner's continued denials of

guilt as to Counts I and X and his argument that the court had not complied with Rule 11, the Court refused either to set aside the pleas of guilty or to allow them to be withdrawn (Appendix p.A1 at A3). The court sentenced petitioner to imprisonment for eighteen months on each count to run concurrently (*Ibid.*)

On appeal to the United States Court of Appeals for the Seventh Circuit, petitioner raised the question of whether the district court had erred in accepting petitioner's pleas of guilty and subsequently imposing sentence on those pleas when the court had failed to follow the requirements of Rule 11. The Court of appeals held that the district court failed to comply with the requirements of Rule 11 as to Count I and vacated the plea, but found that the record showed the district court did comply with Rule 11 as to Count X and affirmed petitioner's conviction and sentence as to that count (Appendix p. A1 through A15).

In Part I of its opinion, addressed to Count I, the conspiracy count, the court of appeals found that the district judge did not personally inquire or determine of the petitioner that he understood

the nature of the charges and failed to ever mention the nature of the charge; that the record of the conduct about which petitioner was questioned was notable for what it failed to include or elicit from petitioner; and that there was no mention of the critical conduct. (Appendix A6 through A9). The court of appeals held that the district court had failed to follow the requirements of Rule 11 (c)(1) concerning the advice and understanding of the nature of the charge and had failed to follow the requirements of Rule 11(f) in that the record did not show a factual basis for the plea (Appendix p. A6 through A12). The court also noted, with respect to the entire record encompassing both counts, a failure to comply with Rule 11(e)(2). (Appendix p. A2)

In Part II of its opinion, addressed to Count X, the court of appeals stated that the record showed that the district court had informed petitioner of and determined that he understood the nature of the charge of knowingly making false declarations while under oath before the grand jury in Count X and that the record showed a factual basis for the plea of guilty to Count X (Appendix p. A12 - A15).

The entire transcript of the hearing on January 31, 1977, wherein the guilty plea was accepted, so far as it specifically pertains to Count X, is as follows:

THE COURT: Turning now to Count X--

MR. COHEN: With respect to Count X, your Honor, it is my understanding, of course, that to make out the offense, only one of the allegations material to the point in inquiry need be admitted by the defendant. I would request the Court to direct the defendant's attention to Paragraph 4, wherein it is alleged that one of the material allegations was that the defendant stated that he had not traveled in interstate or foreign commerce to transport proceeds illegally obtained from the Water Pollution Abatement Project. You see that, Mr. Wetterlin?

THE DEFENDANT: Yes.

MR. COHEN: That matter was not true, was it? You had traveled in foreign commerce?

THE DEFENDANT: Yes, that was not true.

THE COURT: At the time you made the statements, you knew they were false?

THE DEFENDANT: Yes.

THE COURT: Would the Government show that the Grand Jury proceedings were material?

MR. WEHNER: Yes, your Honor, the materiality of the Grand Jury was investigating mail fraud and corruption involving the East Chicago Water Pollution Abatement Project; that project is the subject of the perjury count.

The plea of guilty to Count X was to only one of the allegations set forth in that count (Appendix p. A20 - A23). To the question, "Sir, did you ever travel in interstate or foreign commerce to transport proceeds illegally obtained from the Water Pollution Abatement Project?", the respondent had answered "NO." At the time the plea of guilty was entered to Count X, petitioner admitted that he had travelled in foreign commerce and therefore the matter was not true. Nothing appears in the record concerning the transportation of proceeds illegally obtained from the Water Pollution Abatement Project.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals in affirming the conviction and sentence as to Count X and the opinion of the court of appeals in Part II, upholding the acceptance of petitioner's guilty plea and imposing sentence as to Count X, are in conflict with decisions of other courts of appeals on the same matter. In holding that the record made during the acceptance of petitioner's plea of guilty to Count X

(*supra*. p. 7) shows compliance with the requirements of Rule 11, the court of appeals has decided a federal question in a way which is in conflict with applicable decisions of this Court. The decision is such a departure from the accepted and usual course of judicial proceedings, and, the sanction of such a departure by the district court, calls for an exercise of this Court's power of supervision.

In *McCarthy v. United States*, 394 U.S. 459 (1969), this Court held that compliance with Rule 11 requires the district judge to inquire into the defendant's understanding of the nature of the charge and to satisfy himself that there is a factual basis for the plea; that the judge must determine that the conduct which the defendant admits constitutes the offense charged in the indictment to which the defendant has pleaded guilty. (394 U.S. at 367). It was also held that there is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him. (394 U.S. at 470; this Court's emphasis).

In *Santobello v. New York*, 404 U.S. 257, 261, this Court stated that Rule 11 "makes it clear that the sentencing judge must develop, *on the record*, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge." (Emphasis by the Court)

The decision of the court of appeals that the record (*supra*. p. 7) on the guilty plea to Count X, reveals that the district court made the necessary determination that the petitioner understood the nature of the charge in Count X (Appendix p. A14) and that the record revealed a sufficient factual basis for the acceptance of the guilty plea on Count X (Appendix p. A15), is in conflict with this Court's decisions in *McCarthy* and *Santobello* and in conflict with decisions of the Court of Appeals for the Second Circuit in *Seiller v. United States*, 544 F2d 554 (1975), *Rizzo v. United States*, 516 F2d 789 (1975), and *Irizarry v. United States*, 508 F2d 960 (1974); and with decisions of the Fifth Circuit in *United States v. Sassoon*, 561 F2d 1154 (1977), *United States v. Coronado*, 554 F2d 166 (1977), and *United States v. Vera*, 514 F2d 102 (5th Cir. 1975).

At no place does the record show that the district court addressed petitioner personally and informed him of, and determined that he understood, the nature of the charge in Count X to which the plea of guilty was offered, as required by Rule 11 and mandated by this Court in *McCarthy*. At no place does the record show petitioner's admission of conduct which constituted the offense charged in Count X, to which the guilty plea was entered, or any other factual basis for that plea, as required by *McCarthy*.

The portion of Count X (Appendix p. A20), to which the guilty plea was offered (*supra*. p.7), was that petitioner had denied that he had travelled in interstate or foreign commerce to transport proceeds illegally obtained from the Water Pollution abatement Project. The only conduct which petitioner admitted was that such was not true because he had travelled in foreign commerce (*Ibid.*). The record is silent as to the petitioner's understanding of the question asked of him as a whole. The record is also silent as to petitioner's transportation of illegally obtained funds or of his knowledge of their having been illegally obtained.

The conduct petitioner admitted does not constitute the offense to which the guilty plea was offered, as required by Rule 11 and this Court's decision in *McCarthy*. Such conduct, the foreign travel, goes only to part of the ill-phrased multiple question asked of petitioner in the grand jury. For the court of appeals to have determined otherwise is in conflict with the principles set forth in this Court's opinion in *Bronston v. United States*, 409 U.S. 352 (1973) as well as in *United States v. Brumley*, 560 F2d 1268 (5th Cir.,1977); *United States v. Wall*, 371 F2d 398 (6th Cir., 1967); and *United States v. Cook*, 497 F2d 753 (9th Cir., 1972),dissenting opinion adopted in *United States v. Cook*, 489 F2d 286 (9th Cir., 1973).

To reach out and grasp the district court's use of the plural "statements" and "they" in the only question asked of petitioner by the judge, as did the court of appeals in reasoning that the petitioner admitted all of the conduct embodied in the grand jury questions (Appendix p. A15), strains the imagination. That reasoning is completely inconsistant with the finding in Part I of the opinion of the court of

appeals that the critical elements of the conspiracy charged in Count I were never mentioned and thus never admitted by petitioner (Appendix p. A9). The critical elements of the conspiracy charge included the illegally obtaining of proceeds from the Water Pollution Abatement Project. Furthermore, in contrast to its conclusion as to Count X, the court of appeals,in setting out the facts,recited that "despite defendant's continued denials of guilt as to Counts I and X and his argument that the court had not complied with Rule 11, the court refused to set aside the plea or to allow the defendant to withdraw his plea of guilty to Counts I and X" (Appendix p. A3). In *McCarthy*, this Court refused to accept the Government's argument that the district court could have "assumed" that petitioner entered his plea with a complete understanding of the charge against him. The court of appeals, here, assumed what the district court could have assumed. The assumption that the district court used the plural "apparently to clarify that [petitioner's] response was not limited only to" travel in foreign commerce, is no more valid than an assumption that such

was a grammatical error. There was only one statement made by petitioner in response to the particular question in the grand jury and that statement consisted of the word "NO." Petitioner's answer, "Yes" to the Court's only question to him, is nothing more than the guilty plea itself or at best, an affirmative response to a question whether he had done what was charged. Such, alone, is insufficient under Rule 11. The opinion of the court of appeals also notes that the district court also failed to follow Rule 11 (e)(2) in that the plea agreement was never disclosed in open court on the record, but that defendant did not argue that such required the plea to be vacated (Appendix p. A2). The issue raised in the court of appeals was the district court's failure to comply with Rule 11 and the failure to comply with Rule 11(e)(2) was mentioned in appellant's reply brief. To ignore such a failure of compliance, merely because argument was not concentrated thereon, is in conflict with *United States v. Journet*, 544 F2d 633 (2nd Cir., 1976); *United States v. Hilyer*, 543 F2d 41 (8th Cir., 1976); and *United States v. Untiedt*, 479 F2d 1265 (8th Cir., 1973).

The decision and opinion of the court of appeals that there was compliance with Rule 11 in accepting petitioner's guilty plea to Count X and imposing sentence thereon based upon the record in the district court, is such a departure from the accepted course of proceedings and the sanction of such a departure by a district court, that an exercise of this Court's supervisory powers is called for. This Court's decision in *McCarthy* was made pursuant to its supervisory power over the lower federal courts (394 U.S. 459, at 464). The proceedings in the district court and their sanction by the court of appeals with respect to petitioner's plea of guilty to Count X is in flagrant disregard of this Court's mandate in *McCarthy*.

In its opinion in *McCarthy*, this Court stated that it granted certiorari because of the importance of the proper construction of Rule 11 to the administration of criminal law in the federal courts (394 U.S. 459 at 463). This Court noted that in 1968 approximately 86% of all convictions obtained in United States district courts were pursuant to pleas of guilty or nolo contendere. There is no reason to believe that with the increase in case load,

the percentage is lower today. The requirement that Rule 11 be strictly followed in accepting and sentencing on guilty pleas is as important in 1978 as it was in 1969.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Seventh Circuit affirming petitioner's conviction and sentence as to Count X.

Respectfully submitted,

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October, 1978

APPENDIX

In the United States Court of Appeals For the Seventh Circuit

No. 77-1716

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MELVIN C. WETTERLIN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. H CR 76-114—**Phil M. McNagny**, *Judge.*

ARGUED APRIL 10, 1978—DECIDED AUGUST 24, 1978

Before CUMMINGS and WOOD, *Circuit Judges*, and SOLOMON, *Senior District Judge.**

WOOD, *Circuit Judge.* Defendant-appellant Wetterlin was indicted for his participation in a scheme which allegedly involved the unlawful taking by himself and others,[1] including public officials and contractors, of

* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, is sitting by designation.

[1] Of the others named in the indictment, five (Messrs. Fitzgerald, Kovach, Leahu, Schubert, Hamilton) went to trial and were found guilty. Their convictions have been affirmed

(Footnote continued on following page)

more than two million dollars from a public works project in East Chicago. On January 31, 1977 after entering into negotiations with the government,[2] Mr. Wetterlin entered pleas of guilty to Counts I and X of the indictment. In February the government sought to have the plea revoked, which the defendant resisted. The court

[1] *continued*
by this court on appeal. *United States v. Fitzgerald*, No. 77-1524 (7th Cir., decided June 14, 1978). Mr. Hinesley also entered a plea of guilty, and Mr. Hernly testified for the government and received immunity.

[2] As a result of those negotiations, the defendant agreed to plead guilty to Counts I and X of the indictment, and to four counts of failure to file income tax returns (misdemeanors). The defendant agreed to cooperate with the government and to testify at any proceeding relating to the case. In exchange the government agreed to drop all remaining counts of the indictment, agreed that its recommendation as to sentencing would be limited to opposing probation, and agreed to make the extent of the defendant's cooperation known to the sentencing judge.

While the court accepted the guilty pleas entered by Wetterlin at the January hearing, it indicated that it was reserving ruling on the petition, which included the plea agreement, and referred it to the probation office for a presentence report. Rule 11(e)(2) requires: "If a plea agreement has been reached by the parties, the court, shall on the record, require the disclosure of the agreement in open court . . . at the time the plea is entered." At the January hearing, the judge made references to the petition and ascertained that no promises, other than those contained in the plea agreement, had been made to the defendant. We feel the rule's language is clear and requires more than mere reference on the record to the agreement; rather the court should articulate *on the record* the specific terms contained in the agreement. See 8 MOORE'S FEDERAL PRACTICE ¶11.05[2]. The defendant, however, does not argue on appeal that the failure to comply with Rule 11(e)(2) requires his plea to be vacated.

The defendant also alleges no error in regard to the guilty pleas on the four misdemeanor counts.

permitted the plea to stand.[3] Subsequently the defendant obtained new counsel who challenged the procedures employed by the court at the January plea hearing, alleging that they failed to comply with the procedural requirements for accepting a guilty plea mandated by Rule 11 of the Federal Rules of Criminal Procedure, and asserted that Mr. Wetterlin was now denying his guilt. At the May 24, 1977 disposition hearing the court indicated that "serious questions" had been raised by the defendant and that it was not prepared to go forward with the sentencing. At the June 29, 1977 disposition hearing the district judge indicated that he felt he "had been had" and despite defendant's continued denials of guilt as to Counts I and X and his argument that the court had not complied with Rule 11, the court refused to either set aside the plea or to allow defendant to withdraw his plea of guilty to Counts I and X.[4] The court sentenced defendant under 18 U.S.C. § 4205(b)(2), to eighteen months on each count, to run concurrently,

[3] The government's petition to revoke the plea has not been made part of the record. The government in its brief indicates it became dissatisfied with Mr. Wetterlin's cooperation, and sought either to have the plea revoked or for the court to make further inquiry into the factual basis for the plea. The defendant argued that the government had no standing to challenge the factual basis for the plea on Count I. Further, that he had stated facts from which the court had determined that there was factual basis for the plea. He also argued that if the government felt he was not answering truthfully its recourse was to indict him for perjury. At a hearing held by the court on the government's motion, the court indicated that it felt there was a factual basis for the plea, and that it was denying the motion. The court also secured from Wetterlin's attorney the assurance that there was no "intention . . . at this time, or in the foreseeable future, to question the basis of his plea."

[4] The government also argues that defendant's failure to move to withdraw his plea until the June 29 hearing is proof of defendant's "calculated gamesmanship of the worst form." However, the record indicates that defendant made his attack on the plea for failure to comply with Rule 11 only shortly after retaining new counsel and prior to the scheduled sentencing hearing in May. Since he was attacking the plea under Rule 11, it was not necessary to file a Rule 32 motion for withdrawal of the plea, and he only did so at the June hearing because the government and apparently the court felt such a motion was necessary.

plus a $5,000.00 fine on Count I. Wetterlin appeals from his conviction and sentence and seeks to have his pleas of guilty vacated and to be allowed to plead again because the district court failed to comply with the requirements of Rule 11.[5]

[5] The sections of Rule 11 relevant to this appeal are:

ADVICE TO DEFENDANT. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(f) DETERMINING ACCURACY OF PLEA. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such a plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) RECORD OF PROCEEDINGS. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

Specifically, defendant Wetterlin argues that the court did not comply with Rule 11(c)(1) because it failed to inform him of and determine that he understood the nature of the charge to which the pleas were offered, and did not comply with Rule 11(f) and (g) because it failed to establish on the record the factual basis for the pleas. The government in response argues that "based on all the circumstances surrounding the defendant's plea, there [is] substantial evidence that he understood the nature of the charges against him" in both Counts. The government also contends that the record of the plea hearing on January 31, 1977 reveals a sufficient factual basis for each of the pleas. In regard to the conspiracy count the government further argues that since judgment was not entered until later, under the language of Rule 11(f) the judge was free to consider the evidence he heard at the trial of defendant's alleged co-conspirators to determine whether there was a factual basis for that plea.

I. COUNT I

A. Advice Concerning the Nature of the Charge.

The Supreme Court has stated that because a plea of guilty is itself a conviction, it "shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Kercheval v. United States*, 274 U.S. 220 (1927). Rule 11 has always required compliance with this mandate and now section (c), amended in 1975, sets forth with specificity not only the method to be used in giving this advice: "the court must address the defendant personally in open court and inform him of, and determine that he understands . . ."; but also the particular advice which must be given, subsection (1) specifying that the court must inform and determine that the defendant understands "the nature of the charges to which the plea is offered."

In Count I the defendant and six others were charged with a complex conspiracy involving the use of the mails in furtherance of a scheme to defraud the East Chicago, Indiana, Board of Sanitary Commissioners and the citizens of that district, as well as the use of interstate and foreign commerce with the intent to bribe public officials. The charge of "conspiracy" is not a self-explanatory legal term or so simple in meaning that it can be expected or assumed that a lay person understands it. That is particularly true of the conspiracy charge in this case, which took up 25 pages, involved 48 paragraphs and 64 overt acts. However, the district judge failed to ever mention at the time of the plea hearing the nature of the charges in Count I, even to describe it generally as a conspiracy. The judge made no effort to explain the law of conspiracy generally or by reference to the specific charge of this case, nor did he personally inquire and determine that the defendant understood the nature of the charges.[6] Particularly under the circumstances of this case involving a complex conspiracy, we feel the judge should not have assumed that the defendant already knew and understood what the charges were, but rather the court should have assumed he was ignorant of the charges and thus used the hearing to inform the defendant "of some aspects of legal argot and other legal concepts that are esoteric to an accused." *United States v. Coronado*, 554 F.2d 166 (5th Cir. 1977). The Supreme Court in *McCarthy v. United States*, 394 U.S. 459, 467 (1969), noted that the purposes and goals of Rule 11 are undermined when the court resorts to "assumptions," instead of establishing a record based on defendant's responses to the court's questioning, finding that there cannot be compliance with Rule 11 where the "district judge does not personally inquire whether the defendant underst[ands] the nature of the charge." This court has also previously held that for the judge to inquire of the defendant whether he has discussed the charges with his attorney, as the judge did in the instant case, does not satisfy the

[6] We are not persuaded by the government's argument that because the defendant waived the reading of the indictment at the plea hearing, the judge was relieved of his duty under Rule 11 to inform the defendant of the charges and determine that he understood them. While reading the indictment *may* be one way of informing the defendant of the nature of the charges, it is not limited to this method and, in fact, a more informative explanation of the charges would be desirable. In addition, reading the indictment clearly does nothing to establish on the record that the court personally determined that the defendant *understood* the nature of the charges.

McCarthy mandate or Rule 11.[7] *Majko v. United States*, 457 F.2d 790 (7th Cir. 1972). We feel that any burden the requirements of Rule 11 place on the court or the district judge is inconsequential in light of its salutary goal of insuring that guilty pleas are voluntarily and intelligently made.

We hasten to add that this colloquy between the judge and the defendant as to the nature of the charges will vary from case to case, depending on the peculiar facts of each situation, looking to both the complexity of the charges and the personal characteristics of the defendant, such as his age, education, intelligence, the alacrity of his responses, and also whether he is represented by counsel. *Irizarry v. United States*, 508 F.2d 960, 964 (2nd Cir. 1974). However, none of these characteristics can be a substitute for the explicit requirement of the rule that the judge personally, in open court, on the record, determine that the defendant knows and understands the nature of the charges. Having examined the record carefully, we find in the present case that the

[7] The government urges this court to look to the plea petition to find that this requirement has been met. Initially we note, see n.2, that the contents of this petition were not disclosed on the record at the plea hearing and that although the guilty plea was accepted, the district judge reserved ruling on the petition. One of the statements in the petition read: "I have received a copy of the indictment and have read and discussed it with my lawyer and believe and feel that I understand every accusation made against me. . . . My lawyer has informed me . . . as to the nature and cause of every accusation against me." The court inquired of the defendant whether he had signed the petition, but never specifically referred to these statements and did not personally inquire or determine of the defendant that he understood the charges, which is what the rule requires. For the defendant to merely state that he believes he understands provides no basis from which the court could conclude that he does in fact understand the charges. This is particularly true here since neither in the petition nor at the hearing does the defendant ever set forth what was his understanding of the charges. See *Sierra v. Government of Canal Zone*, 546 F.2d 77 (5th Cir. 1977). Similarly other circuits have found that the assurance that counsel has advised his client as to the charges is not compliance with Rule 11. *Phillips v. United States*, 519 F.2d 483, 485 (6th Cir. 1975); *United States v. Cody*, 438 F.2d 287 (8th Cir. 1971).

district judge failed to comply with the requirements of Rule 11(c)(1) as to Count I and accordingly, under *McCarthy*, that guilty plea must be vacated and the defendant allowed to plead anew.

B. The Factual Basis for Count I.

Even though we have already determined that it is necessary to vacate the guilty plea as to Count I because of the failure to comply with Rule 11(c)(1), we will also address the issue of whether the record reveals a factual basis for accepting the guilty plea on the conspiracy charge.[8]

In the present case, after the defendant had been given the Rule 11 advice, the court moved to establish

[8] The government points to the inconsistency of defendant's present position in attacking the factual basis for the plea on Count I, noting his earlier resistance to the government's motion to revoke the plea, challenging its factual basis. The government argues this indicates that he is engaging in "pure calculated gamesmanship", which should not be condoned by this court. See also n.3, *supra*. We note, however that the government itself has taken an inconsistent position in regard to this very issue as evidenced by its earlier attack and its current defense of the factual basis for Count I. While we do not approve of "game playing" and do not condone actions which appear to be a deliberate effort to manipulate proceedings to one's advantage by changing positions, we do not feel that was done here. The defendant indicates he resisted the government's earlier move because he saw it as attempted retaliation by the government for what it claimed was his uncooperativeness. The government in its brief indicates his lack of cooperation was the cause of the motion. Apparently, it was an attack on the factual basis only in the sense that it appeared to the government that Mr. Wetterlin's unwillingness to admit to certain behavior was inconsistent with his guilty plea. This should have alerted the court to the necessity of re-examining the conduct which the defendant admitted and to the possible need for further questioning of the defendant to erase any doubts as to the factual basis for the plea. We do not feel, however, that this incident prevented the defendant from later raising the Rule 11 issue with the district court before judgment was entered, when he retained new counsel. We note also that the government does not contend that the defendant is estopped from arguing this issue.

the factual basis for the plea. The district judge asked the government to state the overt acts the defendant was charged with and then added, "in order to shorten this . . . point out those parts of the indictment under Count I specifically involving this defendant." The record of the conduct about which the defendant was questioned is notable for what it fails to include or elicit from the defendant. There is no mention of or reference to the critical paragraphs in the indictment which identify the conspiracy scheme and objects and spell out the means and manner by which the objects were to have been accomplished. There is no mention of his participation at the important Palmer House meeting, where the plan to hide two million dollars was discussed, and the fund created for bribing public officials; nor of his knowledge of the execution of the fraudulent performance bond; nor that he knew of the mailing of fraudulent service and rental contracts to transfer funds to Switzerland. At no point in the hearing does the government either summarize the evidence showing the conspiracy plan and agreement and the defendant concede his involvement, or does the defendant admit to conduct which would establish the critical elements of a conspiracy, i.e., "what role did this particular defendant play in the overall venture, when did he play that role, did he know the purpose and did he share in the specific criminal venture" of his alleged co-conspirators. *Seiller v. United States*, 544 F.2d 554. We find that the critical elements of the conspiracy charged were not admitted by the defendant and not established on the record at the January 31 plea hearing, when the court accepted the guilty plea on Count I.

The government, however, also argues that if the factual basis cannot be found on the record at the time of acceptance of the plea, this does not make a plea invalid, since, according to Rule 11(f), the critical point at which this determination must be made is before the court enters judgment which in this case did not occur until June 29, 1977. Thus, according to the government, the district judge was entitled to consider the evidence he had heard at the post-plea trial of this defendant's alleged co-conspirators to establish the factual basis for Mr. Wetterlin's plea. We reject completely the government

argument insofar as it urges that this court may look to the transcript of that trial to determine if the district court was correct in finding a factual basis for the plea here. To allow such a maneuver would make meaningless Rule 11(g), which requires that a "verbatim record of the *proceedings at which the defendant enters a plea* shall be made and . . . [this] record shall include . . . the inquiry into the accuracy of a guilty plea," (emphasis added) and the mandate of the Supreme Court in *Santobello v. New York*, 404 U.S. 257 (1971), that "the judge [shall] develop *on the record* the factual basis for the plea." General references by the district judge to the fact that he heard evidence at another trial which related to this charge and this defendant, but without specifying precisely what evidence he had in mind, is not sufficient for this court to consider that entire trial as being part of this record.

The Advisory Committee comments and various cases interpreting this aspect of the rule indicate that it is permissible for the district judge to consider and look to more than the defendant's responses to the court's questions to determine whether there is a factual basis for the plea.[9] However, the rule requires that whatever

[9] The 1966 Advisory Committee Note states: "The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged. . . ."

The Second Circuit in *Irizarry v. United States*, 508 F.2d 960, 967-68 (2nd Cir. 1974), states that while the judge may rely on any facts at his disposal to evaluate the existence of a factual basis, anything relied on must be made a part of the record of the plea proceeding. Similarly in *Sassoon v. United States*, 561 F.2d 1154, 1159 (5th Cir. 1977), that court indicated that while things such as presentence reports can be considered, whatever the source of the factual basis must appear clearly on the record, and a mere reference of allusion to it on the record is insufficient. The Fifth Circuit in *United States v. White*, 483 F.2d 71 (5th Cir. 1973), rejected the government's argument in that case, that the factual basis could be found in testimony given at the trial of co-defendants which occurred after the acceptance of the plea. The court there stated that there must be a factual basis established before accepting the plea and that the record of the plea hearing must reveal that basis.

(Footnote continued on following page)

the judge considers in making this determination must appear *on the record*, and what is on the record in the instant case, regardless of whether the June 27, 1977 hearing is also considered, is insufficient to establish the factual basis for the plea. In addition we interpret the rule to require that a district judge shall not *accept* a guilty plea until he has determined that there is a factual basis for the plea. This court only recently had occasion to note in discussing the purpose for the factual basis requirement that "the judge must determine 'that the conduct defendant admits constitutes the offense . . . to which [he] has pleaded guilty', a requirement designed to 'protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within that charge.'" *Carreon v. United States*, No. 77-2143 (7th Cir. June 14, 1978) Slip op. at 3. We fail to see how such a critical determination can be left until after the acceptance of the guilty plea. The "escape-hatch" phrase in Rule 11(f) clearly would permit the court "even though it ha[d] originally accepted a guilty plea, to set the plea aside if it determine[d] prior to sentencing that there was no factual basis for the plea." 8 MOORE'S FEDERAL PRACTICE, ¶11.02[2] at 11-33. We also believe that in a situation where after the district judge has determined there is a factual basis and has accepted the plea but has not entered judgment there is an attack made by the defendant on the plea, the judge should be able to look to other evidence[10] to resolve the problem. However, if the district judge finds it necessary to look to evidence other than the defendants' statements to establish the factual basis for the plea in any situation, these additional facts or evidence must be specifically articulated on the record. That was not done in this case.

[9] *continued*

Professor Moore states that "the incorporation of this 'escape hatch' in the Rule does not relieve the judge of making the inquiries required at the time the plea is taken." 8 MOORE'S FEDERAL PRACTICE ¶11.03[3] at 11-73.

[10] This could include admissions made by the defendant to the probation officer and recorded in the pre-sentence report, and conceivably even testimony the defendant has given in another trial, but it is clear that whatever the court is relying on to establish the factual basis must be specifically articulated on the record in order to comply with the purpose of the rule which is to provide a complete record to facilitate review in any subsequent post-conviction proceeding. *McCarthy v. United States*, *supra* at 465.

Accordingly, we find that the judge also failed to establish on the record the factual basis for the conspiracy plea and thus the noncompliance with Rule 11(f) provides an independent basis for vacating the plea on Count I. We wish to make clear that we have no doubt that the district judge intended to fully comply with the requirements of Rule 11 and only accepted the plea because he felt there had been full compliance and that the plea was voluntary. The district judge may himself have had knowledge of facts or circumstances which persuaded him that the defendant understood the charges and that there was a factual basis for plea. Thus it is not without regret that this court finds it necessary to vacate the plea on Count I; however, the rule is explicit in its requirement that compliance be shown *on the record.* Because we find that the record does not show that there was compliance with Rule 11(c)(1) and (f), we are required by *McCarthy* to vacate the guilty plea and to allow the defendant to plead again.

II. COUNT X

In Count X, the defendant was charged with "knowingly making material false declarations" while under oath before the grand jury in violation of 18 U.S.C. § 1623. The defendant contends that the same infirmities exist as to the guilty plea on Count X, namely, there is no showing on the record that the court personally determined that he understood the nature of the charges, and further that the record does not reveal a factual basis for the plea.

A. Advice as to the Nature of the Charges.

It should be obvious that when a defendant pleads guilty to more than one charge at a plea hearing Rule 11 does not require the district judge to repeat all the advice specified in Rule 11(c) before taking the plea on

each charge. However, in order for the rule to accomplish its intended purpose it is essential for the district judge to inform the defendant of and determine that he understands the nature of each particular charge and the maximum possible penalty as to that charge, i.e., he should comply with Rule 11(c)(1) as to each individual charge for which a plea of guilty is offered.

The record reveals that the judge at the outset of the hearing went over the advice specified in Rule 11(c), except as to the "nature of the charges" element in subsection (1). Just as the district judge began to direct his inquiry to the charges in Count X, the defendant's attorney interrupted and offered to the court his understanding of the nature of the charge specifying what must be admitted by the defendant in seeking to plead guilty to the charge. Following statements by both the attorney and the defendant, the court directed a question to the defendant. We find by looking to the total circumstances surrounding the plea on this charge, including the defendant's obvious intelligence, the fact that he was represented by counsel, the relatively uncomplicated nature of the charge, his own statements at the hearing, in combination with the inquiry by the judge, that the record shows that the judge personally determined that the defendant understood the nature of the charges in Count X. We should make it clear that we are not approving procedures where the attorney's assurances regarding the meaning of the charge are found sufficient, nor merely because the defendant is well-educated, obviously intelligent, and represented by counsel that it is not necessary for the judge to personally determine that the defendant understands the charges for the rule clearly requires that this be done. However, we are mindful of the words of the Supreme Court in *McCarthy*, where it observed, "In all such inquiries, '[m]atters of reality, and not mere ritual, should be controlling'." 394 U.S. at 468, n.20 (citation omitted.) In comparing our finding on this count with our earlier finding on Count I, it is clear that it is not the mere length of inquiry which satisfies the rule, nor is there any particular phrasing which must be used, nor must the questioning occur in any particular order;

rather, what is required in order to comply with Rule 11(c)(1) is that the record of the colloquy between the defendant and the court reveal that the court personally determined that the defendant understood the nature of the charges against him. We find that the record as to the plea on Count X reveals that the district judge did make the necessary determination.

B. The Factual Basis for Count X

In September, 1975 the defendant had appeared before the grand jury. During his appearance he was asked "[D]id you ever travel in interstate or foreign commerce to transport proceeds illegally obtained from the Water Pollution Project?" The indictment charged that his "No" response was a "knowingly false" declaration in violation of 18 U.S.C. § 1623. Defendant contends that this is a divisible or multiple question, and that while he admitted at the plea hearing that he had answered falsely to one part, or one question, i.e., he had traveled in foreign commerce, he did not admit that he did so with funds he knew to be illegally obtained. He claims the record is deficient in that it does not show what his understanding of the question was at the time he answered. *United States v. Bronston*, 409 U.S. 352 (1972). Defendant apparently seeks to imply that he could have understood the question only to be asking whether he had ever traveled in interstate or foreign commerce, not whether he had done so with funds illegally obtained from the project and thus that his response to the grand jury could have been "literally accurate," and thus not a violation of the statute. *Blumenfeld v. United States*, 306 F.2d 892, 897 (8th Cir. 1962). We feel such an interpretation conflicts with the obvious meaning and purpose of the question, for clearly the grand jury was not interested in finding out merely whether the defendant had ever traveled in interstate or foreign commerce, and for defendant to suggest that this is how he may have understood the question strains credulity. Furthermore, the record establishes that the defendant understood both at the time of the grand jury questioning and at the plea hearing that the question was not so limited. The question in its entirety was read

at the time of the hearing, and when he was asked "[T]hat was not true was it?", the defendant answered "[T]hat was not true." The district judge, apparently to clarify that his response was not limited only to the statement, "You have traveled in foreign commerce," as phrased by his attorney asked, "At the time you made the statements, you knew *they were* false? (emphasis supplied)" To which the defendant answered, "Yes." We find that this inquiry established not only the essential fact that at the time defendant answered he knew his answer to be false, but also that he knew his answer to the entire question i.e., all statements in the question, to be false, and that he was admitting this conduct to the court. We find that while more detail would perhaps have been desirable, the record does reveal a sufficient factual basis for acceptance of the guilty plea on Count X.

CONCLUSION

Accordingly, for the reasons given above, we hold that the district court failed to comply with the requirements of Rule 11 as to Count I, and under the rule of *McCarthy* the plea on that count must be vacated and the defendant allowed to plead again. We find that the record shows that the district court did comply with Rule 11 as to Count X and, therefore, defendant's conviction and sentence as to that count is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Opinion by Judge Wood

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

August 24, 1978

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. GUS J. SOLOMON, Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States
No. 77-1716 vs.	District Court
MELVIN C. WETTERLIN, Defendant-Appellant.	for the Northern District of Indiana, Hammond Division. No. H 76-Cr-114 Phil M. McNagny, Judge.

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the plea as to Count I is VACATED, and the con-

viction and sentence as to Count X is AFFIRMED, in accordance with the opinion of this court filed this date.

* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, is sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

September 27, 1978

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. GUS J. SOLOMON, Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 77-1716 vs. MELVIN C. WETTERLIN, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. H CR 76-114 Phil M. McNagny, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by counsel for defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the

original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, is sitting by designation.

COUNT X

THE SEPTEMBER 1975 GRAND JURY further charges:

1. On October 9, 1975, at Hammond, Indiana, in the Northern District of Indiana,

MELVIN C. WETTERLIN,

defendant herein, while under oath as a witness before the September 1975 Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Northern District of Indiana in a case then and there pending before the Grand Jury did knowingly make material false declarations.

2. At the time and place aforesaid, the Grand Jury was conducting investigations into possible violations of the criminal laws of the United States including among others, Sections 1341, 1952 and 371 of Title 18, United States Code.

3. During the course of the Grand Jury investigation, it became and was a matter material for the Grand Jury to determine whether the defendant Melvin C. Wetterlin had discussed with contractors, public officials or others the payment of money as a bribe or kickback; whether he had

traveled in interstate or foreign commerce to transport proceeds illegally obtained from the Water Pollution Abatement Project; whether he had knowledge of or had participated in a plan to divert money from the East Chicago Pollution Abatement Project for payment to public officials and others; and whether he had participated in a scheme by which shell corporations were utilized as a method of channelling money out of the East Chicago Water Pollution Abatement Project and out of Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. Construction Companies; whether he was ever a stockholder in a corporation that was used to channel funds from the Pollution Abatement Project to political officials and others; and whether there was any purpose for his meeting with representatives of ITAG in Zurich, Switzerland other than seeking to represent a German equipment supplier in the United States.

4. At the time and place aforesaid, defendant, Melvin C. Wetterlin while under oath, knowingly did declare before the Grand Jury that he had never discussed with contractors, public officials or others the payment of money as a bribe or kickback; that he had not traveled in

interstate or foreign commerce to transport proceeds illegally obtained from the Water Pollution Abatement Project; that he had no knowledge of and had not participated in a plan to divert money from the East Chicago Pollution Abatement Project for payment to public officials and others; that he had not participated in a scheme by which a shell corporation was utilized as a method of channelling money out of the East Chicago Water Pollution Abatement Project and out of Hernly Brothers, Inc. and Fitzgerald and Stutz, Inc. Construction Companies; that he was never a stockholder in a corporation that was used to channel funds from the Pollution Abatement Project to political officials and others; and that the only reason for his meeting with representatives of ITAG in Zurich, Switzerland was to seek to represent a German equipment supplier in the United States.

The aforesaid declarations by the defendant were false and known by him to be false when made because from in or about September 1969 up to and including October 9, 1975, the defendant Melvin C. Wetterlin had discussed the payment of money as a bribe or kickback with contractors, public officials, and others;

he had traveled in interstate and foreign commerce to transport proceeds illegally obtained from the Water Pollution Abatement Project; he had knowledge of and had participated in a plan to divert money from the East Chicago Pollution Abatement Project for payment to public officials and others, which scheme utilized a shell corporation of which he was a stockholder; and he had met with representatives of ITAG in Zurich, Switzerland for reasons other than seeking to represent a German equipment supplier in the United States.

In violation of Title 18, United States Code, Section 1623.

TITLE 18 UNITED STATES CODE

Section 1623. False declarations before a grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of

them is necessarily false, need not specify which declaration is false if --

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not

substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

PLEAS

(a) Alternatives. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not

represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's

request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the

crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include,

without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

Supreme Court, U. S.
FILED
JAN 5 1979
MICHAEL RODAK, JR., CLERK

No. 78-709

In the Supreme Court of the United States

OCTOBER TERM, 1978

MELVIN C. WETTERLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-709

MELVIN C. WETTERLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his guilty plea was accepted without full compliance with the requirements of Rule 11 of the Federal Rules of Criminal Procedure.

Petitioner was convicted on his plea of guilty in the United States District Court for the Northern District of Indiana of conspiring to commit mail fraud and to use interstate and foreign commerce to bribe public officials, in violation of 18 U.S.C. 371, 1341 and 1952 (Count I), and making false material declarations under oath before the grand jury, in violation of 18 U.S.C. 1623 (Count X).[1] He was sentenced to two concurrent terms of 18 months'

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[1]Petitioner's co-defendants went to trial and were found guilty. Their convictions were affirmed in *United States* v. *Fitzgerald*, 579 F. 2d 1014 (7th Cir. 1978), cert. denied, No. 78-396 (Dec. 4, 1978). The facts of the offense in which petitioner was involved are fully set forth in the court of appeals' opinion in that case and in our brief in opposition to the petition for a writ of certiorari.

imprisonment, with eligibility for immediate parole under 18 U.S.C. 4205(b)(2), and was fined $5,000 on the conspiracy count. The court of appeals reversed petitioner's conviction on the conspiracy count due to lack of compliance with Rule 11, but it affirmed the conviction on the false material declarations count (Pet. App. A1-A15; 583 F. 2d 346).[2]

1. Count X charged petitioner with falsely denying before the grand jury that he had "traveled in interstate or foreign commerce to transport proceeds illegally obtained from the Water Pollution Abatement Project" (C.A. App. B-26).[3] The following colloquy occurred during the Rule 11 proceeding (Pet. 7; C.A. App. C-13 to C-14):

> THE COURT: Turning now to Count X—
>
> MR. COHEN: [petitioner's attorney]: With respect to Count X, your Honor, it is my understanding, of course, that to make out the offense, only one of the allegations material to the point in inquiry need be admitted by the defendant. I would request the Court to direct the defendant's attention to Paragraph 4, wherein it is alleged that one of the material allegations was that the defendant stated that he had not traveled in interstate or foreign commerce to transport proceeds illegally obtained from the Water Pollution Abatement Project. You see that, Mr. Wetterlin?
>
> THE DEFENDANT: Yes.
>
> MR. COHEN: That matter was not true, was it? You had traveled in foreign commerce?

[2]Petitioner also pleaded guilty to four counts charging him with the misdemeanor of failing to file federal income tax returns. His one-year prison sentence on these counts was suspended in favor of probation, and he did not appeal in respect to them (Pet. App. A2 n.2).

[3]"C.A. App." refers to petitioner's appendix in the court of appeals.

> THE DEFENDANT: Yes, that was not true.
>
> THE COURT: At the time you made the statements, you knew they were false?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Would the Government show that the Grand Jury proceedings were material?
>
> MR. WEHNER: Yes, your Honor, the materiality of the Grand Jury was investigating mail fraud and corruption involving the East Chicago Water Pollution Abatement Project; that project is the subject of the perjury count.

Petitioner contends (Pet. 11-14) that this questioning was insufficient to determine either that he understood the nature of the charge or that there was a factual basis for acceptance of the guilty plea, because he was asked only whether he had traveled in foreign commerce, not whether he had done so for the purpose of transporting illegally obtained funds. The court of appeals correctly disposed of this hypertechnical argument (Pet. App. A14-A15):

> We feel such an interpretation conflicts with the obvious meaning and purpose of the question, for clearly the grand jury was not interested in finding out merely whether the defendant had ever traveled in interstate or foreign commerce, and for defendant to suggest that this is how he may have understood the question strains credulity. Furthermore, the record establishes that the defendant understood both at the time of the grand jury questioning and at the plea hearing that the question was not so limited. The question in its entirety was read at the time of the hearing, and when he was asked "[T]hat was not true was it?", the defendant answered "[T]hat was not true." The district judge, apparently to clarify that his response was not limited only to the statement, "You have traveled in foreign commerce," as phrased by

his attorney asked, "At the time you made the statements, you knew *they were* false? (emphasis supplied)". To which the defendant answered, "Yes." We find that this inquiry established not only the essential fact that at the time defendant answered he knew his answer to be false, but also that he knew his answer to the entire question i.e., all statements in the question, to be false, and that he was admitting this conduct to the court.

Petitioner was clearly informed that the indictment charged him with falsely denying to the grand jury that he had traveled in foreign commerce in order to transport illegally obtained funds. To any reasonably intelligent person—and petitioner completed 19 years of education (C.A. App. C-2 to C-3) and owned and managed an engineering business (*id.* at C-9)—the court's questioning could only have been understood as an inquiry into whether he had so traveled in foreign commerce for the unlawful purpose specified in the question he was asked before the grand jury. Indeed, petitioner had previously admitted, when questioned about his guilty plea to the conspiracy count, that as an overt act in the conspiracy he had traveled to Switzerland and returned with $200,000 of water pollution project funds that were used to pay bribes (*id.* at C-12 to C-13; see also *id.* at B-21).[4]

Nor is there any inconsistency, as petitioner asserts, between the court of appeals' reversal of his conviction on the conspiracy count and its affirmance of his conviction on the false material declarations count. As the court of

[4]Petitioner's reliance upon cases such as *Bronston* v. *United States*, 409 U.S. 352 (1973) (see Pet. 12), is misplaced. Those cases concerned the entirely different question whether particular questions or answers are sufficiently precise to support a perjury or false statement charge. Petitioner, while suggesting that his false material declarations count was based on an "ill-phrased multiple question" (Pet. 12), stops short of contending that a conviction on that count is therefore unsupportable.

appeals noted, conspiracy is a subtle and complicated charge that even intelligent laymen may have difficulty in comprehending (Pet. App. A6), while perjury is a familiar and "relatively uncomplicated" crime (*id.* at A13). Moreover, as the court below observed (*id.* at A9), while petitioner was specifically questioned concerning the falsity of his testimony before the grand jury, he was not similarly questioned about the conspiracy scheme and the means and manner by which its objects were to be accomplished.

2. Petitioner briefly suggests (Pet. 14) that the district court failed to comply with the requirement of Rule 11(e)(2) that the trial judge "shall, on the record, require the disclosure of [any plea agreement] in open court * * * at the time the plea is offered." The court of appeals correctly concluded (Pet. App. A2 n.2) that petitioner failed to raise this issue below. Petitioner's cursory reference to the subject in a footnote in his reply brief in the court of appeals (page 11) was hardly sufficient to suggest to the Seventh Circuit that he was asserting it as an independent ground for relief.

In any event, the plea agreement was set forth in full in the Petition to Change Plea and to Enter a Plea of Guilty, which was signed by petitioner, defense counsel, and the prosecutor. As the court below noted (Pet. App. A2 n.2), the district court referred to the petition during the Rule 11 proceeding and ascertained that no promises had been made to petitioner other than those contained therein (C.A. App. C-16). Contrary to the view of the court of appeals, we believe that this was sufficient to satisfy Rule 11(e)(2). The Advisory Committee Notes to the 1974 amendment to Rule 11 make clear by their approving reference to *People* v. *West*, 3 Cal. 3d 595, 91 Cal. Rptr. 385, 477 P. 2d 409 (1970) (see 62 F.R.D. 271, 284 (1974)), that the purpose of Rule 11(e)(2) is to assure that the basis for any plea bargain is "disclosed to the court and

incorporated in the record." Such incorporation may be accomplished, as it was here, by the parties' filing "a written stipulation stating the terms of the bargain."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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